U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 10 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed. The AAO will enter an administrative finding of willful misrepresentation on the part of the beneficiary and the petitioner and will also invalidate the labor certification.

The petitioner describes itself as a convenience store. It seeks to permanently employ the beneficiary in the United States as an assistant manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. *See* 8 C.F.R. § 204.5(d).

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: [Blank]
High School: [Blank]
College: [Blank]
College Degree Required: [Blank]
Major Field of Study: [Blank]
TRAINING: [Blank]
EXPERIENCE: Two (2) years in the job offered
OTHER SPECIAL REQUIREMENTS: [Blank]

The labor certification also states that the beneficiary qualifies for the offered position based on the following employment experience:

- Assistant Manager at [redacted] Austin, TX from November 2005 until "Present."
- Assistant Manager at [redacted] in Austin, TX from April 2003 until September 2005.
- Assistant Manager at [redacted] in Liberty Hill, TX from January 1, 2009 until December 31, 2000.

No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury on April 27, 2006. The beneficiary's claimed employment with [redacted] is the only of the three listed on the labor certification which predates the priority date of April 30, 2001. Thus, it is the only employment listed on the labor

certification which can be considered when evaluating the beneficiary's qualifications. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The director's decision denying the petition concluded that the beneficiary's experience with totaled less than two years and, therefore, the evidence did not demonstrate the beneficiary possessed the minimum experience for the offered position at the time of the priority date. On appeal, counsel asserts that the beneficiary possessed the required two years of experience and that director erred in his calculation of the beneficiary's employment experience.

On March 19, 2012, the AAO sent the petitioner a Notice of Derogatory Information and Request for Evidence (Notice). The Notice stated in part:

> According to the labor certification submitted with the petition, the beneficiary qualifies for the offered position based on his employment as an Assistant Manager with from January 1, 1999 to December 31, 2000. The record contains an employment experience letter the purports to be from owner of The letter states that the company employed the beneficiary as an Assistant Manager from January 1, 1999, to December 31, 2000. The date of the letter is in a different font from the rest of the letter and slightly askew, as if the date was physically cut and pasted onto the letter. In addition, the labor certification and the experience letter state the address of is According to the U.S. Postal Service's website, www.usps.com, this appears to be a nonstandard or nonexistent address. Additionally, the record contains copies of the beneficiary's passport which is stamped to show the beneficiary exchanged money in India on September 16, 1999 and September 21, 2000. If the beneficiary was in India to receive these stamps in his passport, it appears he did not work in the United States during the period of employment claimed on the labor certification and experience letter. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592.

Based on the findings discussed above, it appears that your company and the beneficiary knowingly and intentionally submitted a false letter pertaining to the beneficiary's employment. Unless you can resolve the inconsistencies as noted above, the AAO intends to dismiss the appeal and make a finding of fraud or willful misrepresentation against your company. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).[3]

The AAO will also invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.31(d).[4] In addition, the AAO cannot conclude that

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[3] The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.17(i), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989).

[4] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

> If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application

> the beneficiary possesses the required experience for the offered position if the letter submitted to establish the claimed experience is fraudulent. While you may withdraw the appeal, withdrawal will not prevent a finding that you have engaged in fraud or the willful misrepresentation of material facts.
>
> In summary, by submitting a false experience letter to USCIS, your company and the beneficiary sought to procure a benefit provided under the Act through a fraud or a willful misrepresentation of a material fact. The beneficiary provided the documentation, and your company transmitted the document to USCIS in support of its I-140 petition. As a result, your company and the beneficiary are both culpable.

The Notice also stated that the beneficiary and a shareholder of the petitioner share the same surname and informed the petitioner that USCIS records indicate the petitioner has also filed a petition on behalf of the instant beneficiary's son. For these reasons, the AAO questioned the *bona fides* of the job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).

Finally, the Notice requested information regarding the petitioner's ability to pay the proffered wage since USCIS records show that multiple petitions have been filed by the petitioner. If a petitioner has filed multiple petitions for multiple beneficiaries, the petitioner must establish that it has the ability to pay the proffered wages to each beneficiary. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner did not respond to the AAO's Notice. The AAO specifically alerted the petitioner that failure to respond to the Notice would result in dismissal because the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The AAO therefore concludes that the petitioner failed to establish that the beneficiary possessed the required experience for the offered position. In addition, beyond the decision of the director, the petitioner also failed to establish its ability to pay the proffered wage from the priority date and that there was a *bona fide* job opportunity that was available to U.S. workers.

> shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefore shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

As referenced in the AAO's Notice, willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* INA Section 212(a)(6)(C), [8 U.S.C. 1182(a)(6)(C)], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position through meeting the experience requirements of the position offered. The job offered requires two of prior experience as an assistant manager. The labor certification states that the beneficiary gained this experience with and the beneficiary signed the Form ETA 750B under penalty of perjury. In addition to the issues discussed in the NOID, the AAO was unable to confirm the existence of a in Liberty Hill, Texas during the claimed dates of employment. The AAO was also unable to confirm that owned a business in Liberty Hill, Texas during the claimed dates of employment. It is also noted that has the same last name as the petitioner's representative and as the wife of the beneficiary. Other than the experience letters from the petitioner has not submitted any evidence corroborating this claimed employment or addressing the issues set forth in the NOID.

In summary, it is concluded that the petitioner and the beneficiary submitted a fraudulent experience letter to attempt to corroborate the beneficiary's claimed experience on the labor certification. This constitutes an act of willful misrepresentation. The listing of such experience and the submission of the fraudulent letter misrepresented the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision."). This finding shall be considered in any future proceeding where admissibility is an issue. *See Matter of Ho*, 19 I&N Dec. at 591-592.

Further, in addition to making a determination that the petitioner and the beneficiary made a willful misrepresentation of a material fact involving the petition and the labor certification, the AAO is also invalidating the labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The AAO invalidates the labor certification based on a determination of willful misrepresentation of a material fact involving the labor certification pursuant to 20 C.F.R. § 656.31(d).